Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

NINA V. CRYTSER, A MARRIED WOMAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether the District Court failed to recognize and consider controlling state law when it unilaterally determined no property interest existed in the petitioner, contravening the United States Supreme Court's rulings requiring it.

a) The Federal District Court ruled summarily that petitioner's future interest in the residential property did not exist.

II. Whether the IRS's separate tax lien could reach the third party petitioner's prior interest in the property.

a) The lower courts ignored the required statutory definition of what constitutes a "levy", set out in 26 USC §7701(a)(21), and substituted a dictionary definition as their basis for finding no levy occurred.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at No. 07-35007. The opinion of the United States District Court for the Eastern District of Washington is reported at No. CV-06-175-LRS.

## JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, affirming the decision of the District Court's Order (which summarily dismissed the petitioner's claim) was handed down on April 18, 2008. A timely petition for rehearing en Banc was denied on July 22, 2007. An order granting an extension of time to file the petition for a writ of certiorari was filed October 9, 2008 by Justice Kennedy. This court has jurisdiction pursuant to 28 USC §1254(1).

## RELEVANT PROVISIONS INVOLVED

*26 USC §6331(b)*

> The term "levy" as used in this title includes the power of distraint and seizure by any means.

*26 USC §7701(a)(21)*

> The term "levy" includes the power of distraint and seizure by any means.

*26 USC §7426(a)(1)*

> If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a District Court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

## STATEMENT

This appeal involves the recognition of a future interest in real property by a non-assessed spouse, seizure of the proceeds of sale of that interest by the IRS and subsequent federal court determination that no "property interest" existed, no seizure or "levy" occurred and the seized proceeds could properly be applied in satisfaction of someone else's tax obligations.

The concise and material facts are these: (1) In August 1999, the petitioner entered a prenuptial agreement with her soon-to-be husband, Scott Crytser; (2) the prenuptial agreement provided, in relevant part, that the couple's residence would remain the separate property of the husband for a period of five years, "and thereafter will be viewed as joint and community property."; (3) about four years later, in June 2003, the IRS assessed a separate tax liability against the petitioner's husband; (4) about a year after that, in August 2004, the IRS recorded a tax lien against the

couple's residence property; (5) the couple had already entered a binding purchase and sale agreement to sell the residence; (6) a request for discharge as to the petitioner's property interest was denied by the IRS; (7) the lien clouded title to the property and the vendee threatened a civil lawsuit; (8) petitioner was forced to pay over her interest in the proceeds in order to clear title and avoid the vendee's lawsuit; (9) the IRS asserted it had not "levied" any property of the petitioner.

The Federal District Court summarily dismissed petitioner's claim for wrongful levy under 26 USC §7426(a)(1). Instead of applying the required statute defining what constitutes a "levy", the District Court used the term "levy" as defined in Black's Law Dictionary. *Order Granting United States Motion to Dismiss @ 5, fn. 2.* The definitional statute is more far-reaching than the dictionary definition. Although the District Court correctly recognized that wrongful levy actions under 26 USC §7426(a)(1) require an allegation of (a) an interest in or lien on the property, and; (b) that said property was wrongfully levied upon, the court granted summary judgment, saying "plaintiff's theory does not measure up to the requirements of a 26 USC §7426(a)(1) wrongful levy suit," and, therefore, the IRS was immune from suit. *Id @ 6.* In so holding, the District Court opined that petitioner had no property interest at the time she executed the prenuptial agreement in August 1999. It held that petitioner did not acquire <u>any</u> property interest in the personal residence at the time the prenuptial agreement was executed in 1999, but rather, that her property interest arose only after the IRS filed a separate lien against her husband in 2004. This holding ignores the property

concept of future interests. Because it did not recognize petitioner's future interest, the District Court summarily held that Nina Crytser had no property interest which could be wrongfully levied.[1]

On appeal, the Ninth Circuit Court of Appeals affirmed on different grounds, saying that petitioner failed to allege an essential element of a wrongful levy, i.e. a "levy", and, therefore, failed to state a claim for wrongful levy. Both courts focused erroneously on remedies not asserted by petitioner.

This petition seeks to have the Court review summary dismissal of petitioner's claims based on the federal District Court's findings that petitioner had no "property interest", where that right is plainly recognized under the laws of the State of Washington – the determinative law. This petition also seeks to have the Court review the decision of the Ninth Circuit Court of Appeals affirming on different grounds. Again, this holding is erroneous in that the IRS levy was the express basis of petitioner's wrongful levy claim.

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[1] The Federal District Court Order granting dismissal for lack of subject matter jurisdiction over the petitioner's claim was based on its finding that petitioner had no property interest which could be wrongfully levied. This, however, was not the reason for which the IRS sought dismissal; the IRS sought dismissal claiming the petitioner had "voluntarily" paid over the funds from her interest. It asserted in its motion papers that an alleged voluntary payment cannot constitute a waiver of sovereign immunity and, therefore, no subject matter jurisdiction would lie.

## REASONS FOR GRANTING PETITION

As to the first question presented for review, the Federal District Court for the Eastern District of Washington failed to recognize and consider the property law of Washington. State law determines whether a "property interest" exists for purposes of applying the wrongful levy statute. The Federal District Court failed to recognize this settled legal principle when it unilaterally issued its summary judgment. It was unilateral because the basis for the IRS's dismissal motion was not predicated on determination of whether or not the petitioner had the requisite "property interest."

. .. This petition request falls directly under the decision of this Court announced in *Aquilno v. U.S. 363, US 509, 4 L.Ed.2d 1365, 80 S.Ct. 1277.* In *Aquilno*, this Court vacated a lower court's summary judgment order because it found "no discussion in the Court's opinion to indicate the nature of the property rights possessed by the taxpayer under state law." *Aquilno, supra @ 515-16.* The District Court was required to ascertain the petitioner's property rights under state law. *Drye v. U.S., 120 S.Ct. 474 (1999); 528 US 49; 145 L.Ed.2d, 466.* It did not. It failed to recognize petitioner's prior, valid future interest.

Ironically, even the IRS recognizes that future interests are property interests within the meaning of the IRS code, at least when it is to their benefit. At one time, the prevailing rule was that a party to an executory contract did not acquire property or property rights which were subject to attachment by the federal tax lien. *Steven R. Mather et al, Tax*

*Management: Federal Tax Collection Procedure A-29 (Portfolio 638, 2d Ed. 2000) (citing In Re Halprin, 280 F.2d 407 (3rd Cir. 1960)).* Subsequent cases, however, generally provide that a conditional promise under an executory contract is a property right which is subject to attachment. *Id (citing Nakashima, infra; Seaboard Surety Co. v. U.S., 306 F.2d. 855 (9th Cir. 1962)).* The IRS recognizes executory contracts create property rights and interests. *Randall v. H. Nakashima Co. Ltd., 542 F.2d 270, 272-274 (5th Cir. 1976).* It stands to reason that if the IRS can seize property arising from a conditional promise under an executory contract, then the petitioner's property interest here arose at the time she executed her pre-nuptial agreement, four years before the IRS assessment.

Nowhere in the history of this case can either of these federal courts show that the requisite state law analysis was made that petitioner Nina Crytser did not have a "property interest." This is absolutely necessary. The District Court erred in its naked conclusion that Nina Crytser's future interest in the property was not a "property interest". Washington State law is unequivocally clear; her interest is recognized as a lawful property interest. *Marriage of Matson, 107 Wn.2d 479, 482, 730 P2d 668, 670 (Wash. 1986) (prenuptial agreement valid, binding); Marriage of Estes, 84 Wn.App. 586, 590, 929 P2d 500, 205 (Wash Ct. App. Div. III 1997) (citing Freeburn v. Freeburn, 107 Wash. 646, 182 P 620 (1919)(contingent future interest is property), Conrad v. UW, 119 Wn.2d 519, 529, 834 P2d 17, 22 (1992) (citing Board of Regents v. Roth, 408 US 564, 566, 92 SCt. 2701, 2703 (1972) (terms of contract may be source of property interest); In Re Estate of Verbeek, 2 Wn.App. 144, 151, 467 P2d 178, 183*

*(1970); Grey v. Pierce County House Auth., 123 Wn.App. 744, 752, 97 P3d 26, 29 (2004)(property interest created by terms of contract)); Nakashima, supra @ 277 (contract right is property); and see, citations of record.*

If the petitioner's contractual (pre-nuptial) property interest was contingent on the couple staying married for five (5) years, it is a recognized property interest under Washington law – a contingent future interest. If the petitioner's contractual (pre-nuptial) property interest was not conditioned on the couple staying married for five (5) years, it is still a recognized property interest under Washington law – an executory interest. The District Court erred in unilaterally determining that the petitioner had no property interest to assert and also erred in making the determination itself summarily and without discussion.

The Circuit Court in its memorandum decision dated April 18, 2008, affirmed the Federal District Court asserting it could do so on any ground supported by the record. It affirmed on the basis that Nina Crytser's Complaint alleged only that the IRS placed a lien and not a levy on the residence property. The Amended Complaint reads as follows: "At all material times, plaintiff Nina Crytser owned a valuable, enforceable property interest in the above referenced residence and/or the proceeds of sale thereof, and the same has been erroneously, illegally and wrongfully levied or collected by the defendant." The Circuit Court simply did not address the issues raised by the appeal and did not address the legitimacy or validity of her property interest under state law, instead finding erroneously that her Complaint was not well-plead.

As to the second question presented for review, in determining that Nina Crytser had no property interest which could be wrongfully levied, the Federal District Court applied the definition of "levy" from Black's Law Dictionary, not the definitional statute, 26 USC §6331(b), which is set out herein. This was error. A levy is a seizure "by any means" under the definitional statute. Black's Law Dictionary defines it as "to impose or assess a fine or tax by legal authority." *Black's Law Dictionary, 972 (8th Ed. 2004); Order Granting the United State's Motion to Dismiss @ pp. 5, fn. 2.* Based on this dictionary definition, apparently, the Federal District Court ruled that even if Nina Crytser had a recognized state law "property interest" it had not been levied upon. Still, the undisputed facts are that she had an executory prenuptial agreement four (4) years before the IRS's separate lien attached and more than five (5) years before it was recorded. This is a property interest under Washington law. When the IRS levied on 100% of the property proceeds it wrongfully took about $110,000.00 of petitioner's interest in the proceeds of sale of the couple's residence.

## CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-35007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NINA V CRYTSER, a married woman,
Plaintiff - Appellant,
v.
UNITED STATES OF AMERICA,
Defendant - Appellee.

April 10, 2008 ** , Submitted, Seattle, Washington

April 18, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before: BEA and M. SMITH, Circuit Judges, and HOOD *** , Senior District Judge.

OPINION

MEMORANDUM *

Before: BEA and M. SMITH, Circuit Judges, and HOOD***, Senior District Judge.

Nina Crytser appeals the district court's order: (1) dismissing for lack of subject matter jurisdiction her action seeking damages for "wrongful levy"; and (2) dismissing for failure to state a claim her action seeking

a refund from the Internal Revenue Service ("IRS") of her payment of taxes her husband owed.[1]

Nina Crytser brought this action against the United States alleging two alternative grounds for relief. She brought an action for wrongful levy under 26 U.S.C. § 7426(a)(1),[2] claiming the IRS lien on the Crytsers' residence amounted to a seizure of her property because the payment Nina Crytser made to the IRS to obtain discharge of the lien was "involuntary." She also claimed damages in the alternative, under 28 U.S.C. § 1346(a)(1),[3] which in combination with 26 U.S.C. § 7426(a)(4)[4] authorizes a third party who paid the taxes of another to obtain discharge of a lien to bring an action for refund on the ground the third party had an interest in the property the IRS placed a lien upon that was superior to the United States' interest.

The district court dismissed Nina Crytser's wrongful levy action under Rule 12(b)(1) for lack of subject matter jurisdiction on the ground her complaint alleged a lien, not a levy; without a levy, there can be no wrongful levy action. The district court dismissed Nina Crytser's third-party refund action under Rule 12(b)(6) on the ground she failed to exhaust her remedies--Nina Crytser was required, under 26 U.S.C. § 7426(a)(4), to request and obtain a certificate of discharge of the lien before bringing a refund action, but she did not.

On appeal, Nina Crytser challenges only the district court's dismissal of her 26 U.S.C. § 7426(a)(1) wrongful levy action; she maintains the IRS lien against her husband's property was "the functional equivalent" of a levy because she felt she had no choice but to turn over to the IRS the proceeds of the sale of their residence.[5]

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's grant of a motion to dismiss de novo, *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 883 (9th Cir. 2005), and we affirm.

The district court correctly dismissed Nina Crytser's wrongful levy action, the elements of which are as follows:

> First, the person must not be one "against whom is assessed the tax." Second, the person must claim a legally cognizable "interest" in the property. Third, the property must have been "wrongfully levied upon."

*Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991). Nina Crytser's complaint alleged only that the IRS placed a lien (not a levy) on the Crytsers' residence. That Nina Crytser "felt compelled" to pay Scott Crytser's assessed taxes with the proceeds of the sale of their residence to obtain discharge of the lien and avoid a civil action by the purchaser for breach of contract does not convert the IRS lien into a levy. *See United States v. Williams*, 514 U.S. 527, 536, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995) (third party taxpayer who felt compelled to pay her ex-husband's taxes to obtain release of an IRS lien on her residence alleged only a lien--not a levy). Because Nina Crytser failed to allege an essential element of a wrongful levy action--*i.e.*, a levy--she failed to state a claim for wrongful levy.[6]

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. APP. P. 34(a)(2).

***The Honorable Joseph M. Hood, Senior U.S. District Judge for Eastern District of Kentucky, sitting by designation.

[1]Because the facts are known to the parties, we revisit them only as necessary.

[2]Congress has authorized the following action against the United States for wrongful levy:

> Wrongful levy.--If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.26 U.S.C. § 7426(a)(1) (emphasis added).

[3]28 U.S.C. § 1346(a)(1) provides the district courts shall have original jurisdiction over:

> Any civil action against the United States for the recovery of any internal-revenue tax alleged to

> have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]

[4]26 U.S.C. 7426(a)(4) permits the following third-party refund action:

> Substitution of value.--If a certificate of discharge is issued to any person under section 6325(b)(4) with respect to any property, such person may, within 120 days after the day on which such certificate is issued, bring a civil action against the United States in a district court of the United States for a determination of whether the value of the interest of the United States (if any) in such property is less than the value determined by the Secretary. No other action may be brought by such person for such a determination.

[5]Nina Crytser, in her reply brief, "concede[d] that she is not entitled to a refund of seized funds under 28 U.S.C. § 1346(a)(1)" and, thus, she has abandoned her challenge to the district court's dismissal of her refund action for failure to exhaust administrative remedies.

Even if Nina Crytser had not abandoned her challenge to the district court's dismissal of the refund action, such a challenge would fail on the merits. Nina Crytser never sought to obtain a certificate of discharge in her name, which is a prerequisite to a third-party refund action. 26 U.S.C. § 7426(a)(4).

[6]We may affirm a district court's judgment on any ground supported by the record. *Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 418 (9th Cir. 1998).

NO. CV-06-175-LRS
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON

NINA V. CRYTSER,
Plaintiff,

-vs-

UNITED STATES OF AMERICA,
Defendant.

November 2, 2006, Decided
November 2, 2006, Filed

Lonny R. Suko, UNITED STATES DISTRICT JUDGE.

## ORDER GRANTING THE UNITED STATES' MOTION TO DISMISS

BEFORE THE COURT is Defendant United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and For Failure to State a Claim for Which Relief Can Be Granted (Ct. Rec. 5) filed on August 31, 2006 and noted without oral argument on October 11, 2006.

## BRIEF SUMMARY OF FACTS

Plaintiff Nina V. Crytser filed this action on June 12, 2006, alleging the wrongful and illegal seizure of funds by the Internal Revenue Service ("IRS") and seeking the recovery of $ 105,161.76 plus interest, additional

damages, attorneys' fees and costs. Plaintiff alleges that the IRS wrongfully seized $ 105,161.76 from the escrow account for the sale of real property located at 7409 East 44th Avenue, Spokane County, Washington ("Subject Property").

On August 17, 1999, and incident to marriage on August 18, 1999, Plaintiff and Scott Crytser entered into a Prenuptial Agreement ("Agreement"). The Agreement provided that after Plaintiff and Scott were married, they would live at 7409 E. 44th Avenue, Spokane, Washington, and that the ownership of that residence would remain the separate property of Scott Cryster until five years from the date of marriage.

On June 23, 2003, the IRS assessed Scott Cryster's unpaid federal tax liabilities for the years 1995 through 2000. On August 30, 2004, the IRS filed a Notice of Federal Tax Lien with the Spokane County Auditor. The tax lien arose from Scott Crytser's unpaid federal tax liabilities for the 1995, 1996, 1997, and 1998 tax years. On October 29, 2004, and as a result of a purchase and sale agreement entered into on August 28, 2004 for the sale of the Subject Property, Plaintiff and Scott Crytser closed the sale of the Subject Property. The Plaintiff and Mr. Crytser were represented by an attorney during this real estate transaction. [1] Although the parties characterize the voluntariness of the payment differently, Mr. Crytser paid the tax lien in order to convey clear title to the buyers and to avoid a civil suit with the buyer of the Subject Property.

On November 10, 2004, the IRS issued a certificate of discharge regarding the federal tax lien on the Subject Property. The Complaint was filed on June 12, 2006.

The Complaint alleges that before the sale of the Subject Property, Plaintiff tried to secure the discharge or release of the federal tax lien as to her interest in the Subject Property. It is further alleged that the IRS refused to discharge or release the liens and "wrongfully seized plaintiff's community share of sale proceeds." Complaint, ¶¶ 3.14-15. According to the Complaint, the amount wrongfully seized was Plaintiff's community interest in the Subject Property, which she acquired on August 18, 2004, from her spouse Scott Crytser, as agreed upon in a prenuptial agreement. Although the Complaint and Amended Complaint, the latter filed on October 2, 2006, are captioned "Complaint for Refund of Taxes and Interest," the allegations and relief sought are consistent with a wrongful levy action under 26 U.S.C. § 7426(a)(1) in addition to a refund action. The Amended Complaint appears to retract references to "community property" and replaces such terminology with Plaintiff's "one half interest" in the residence.

## DISCUSSION

Defendant argues that Plaintiff fails to distinguish two separate types of actions, refund action and wrongful levy action, in both the original and Amended Complaint. The Supreme Court in *Williams* distinguished between pre-deprivation and post-deprivation, with § 1346(a)(1) identified as post-deprivation relief and § 7426(a) (1) identified as affording pre-deprivation relief. *Williams*, 514 U.S. at 538. A claim for refund would logically be characterized as post-deprivation as one may not seek a refund on that which he or she has not yet paid to the government. As such, the two procedures could, under

the appropriate facts, be considered mutually exclusive, representing separate stages in a procedural continuum. Additionally, as the present action involves a civil action on a claim for refund in addition to a wrongful levy claim, a plaintiff may not initiate such an action unless such plaintiff has exhausted administrative remedies in pursuing such refund. *Williams*, 514 U.S. at 527; 26 U.S.C. § 7422(a).

A. Wrongful Levy Claim and Subject Matter Jurisdiction

Defendant argues that a jurisdictional prerequisite to a 26 U.S.C. § 7426(a)(1) action is an actual levy by the IRS. Defendant further argues that Plaintiff cannot bring a wrongful levy action under § 7426(a)(1) because there is no waiver of the United States' sovereign immunity where there has been no levy.

Plaintiff argues that neither she nor Mr. Crytser voluntarily arranged for the payment to the IRS in exchange for the discharge of the lien encumbering the real estate. Ct. Rec. 14 at 5. Where such payment is not made voluntarily, Plaintiff concludes that a levy occurred. Id. at 6.

The regulations limit wrongful levy actions to situations where the government had no business at all interfering with the third party's property right. *Sessler v. U.S.*, 7 F.3d 1449, (9th Cir. 1993). As the IRS has expounded in its regulations, a levy is wrongful if: (1) it's placed on property exempt under § 6334; (2) it wasn't placed on property in which the delinquent taxpayer had an interest; (3) it's invalid under §§ 6323 or 6324(a)(2) or (b); or (4) the plaintiff's interest in the

property is senior to the federal lien and will be destroyed by the levy. 26 CFR § 301.7426-1(b). Id. (Footnote and citations omitted). Here, however unfair the situation may appear, the IRS had the substantive right to place a levy [2] or lien on the property, and the Plaintiff doesn't contest the validity of the lien itself.

The Plaintiff has invoked the jurisdiction of the district court under 26 U.S.C. § 7426 which authorizes any person, other than the delinquent taxpayer, to bring a "wrongful levy" action. To state a claim under this section, the Plaintiff must show (1) an interest in or lien on the property, and (2) "that such property was wrongfully levied upon." 26 U.S.C. § 7426(a)(1). Plaintiff's claim that the levy was wrongful because the payment of the tax lien was not made voluntarily does not fit properly into any of the "wrongful levy" definitions under 26 CFR § 301.7426-1(b).

Under the principles of sovereign immunity, the United States is immune from lawsuits except where it has acted to waive this immunity. *See United States v. Dalm*, 494 U.S. 596, 608, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1999). Such a waiver by the United States must be unequivocal and "the terms of its consent to be sued in any court determine that court's jurisdiction to entertain the suit." Id. (*quoting United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (*quoting United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)). Further, "[i]t is the burden of the party who institutes a claim against the United States . . . to allege an act of Congress that authorizes the Court to entertain that specific claim." *Ridenbaugh v. Long*, 246 F.Supp.2d 849, 852 n. 1 (S.D.Ohio 2002) (*citing Malone v. Bowdoin*, 369 U.S.

643, 645, 646 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962)).

As to Defendant's defense of sovereign immunity, § 7426 is not a broad grant of jurisdiction for suit brought by any third-party interest-holder; it only waives immunity when there's been a "wrongful levy." As to the wrongful levy claim, Plaintiff's theory does not measure up to the requirements of a § 7426(a)(1) wrongful levy suit. As such, plaintiff's claim in a wrongful levy posture, doesn't provide the necessary waiver of sovereign immunity. This claim must therefore be dismissed.

B. Refund Claim and Subject Matter Jurisdiction

Concerning jurisdiction, the Court construes the Complaint and Amended Complaint to contain a claim seeking refund under 28 U.S.C. § 1346(a). This statute, 28 U.S.C. § 1346, does not say that only the person against whom the tax is assessed may sue, but instead, uses broad language such as "any civil action against the United States;" "any sum alleged to have been excessive;" and "in any manner wrongfully collected." The Court finds the broad language of § 1346, provides the necessary waiver of sovereign immunity for the district court to exercise jurisdiction over Plaintiff's refund action. Thus, the Defendant's alternative motion to dismiss based on lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b) as to the refund claim must be denied.

Defendant next argues that Plaintiff, a third party challenging a federal tax lien, cannot bring a civil action for refund under 28 U.S.C. § 1346(a)(1) without exhausting the requirements of 26 U.S.C. § 6325 and §

7426(a)(4). Defendant contends that the proper provision for seeking judicial review in this case is § 7426(a)(4), which authorizes a third-party with interest in property subject to a federal tax lien to challenge the United States' interest in a post-deprivation proceeding. However under § 7426(a)(4), any civil action for a determination of the value of the United States' interest in property must be brought within 120 days after the issuance of a certificate of discharge. Plaintiff argues that although she didn't exhaust the administrative requirements under §§ 6325 and 7426, this provision, § 7426(a)(4), does not apply to her because the certificate of discharge was issued to Mr. Crytser rather than to her. Ct. Rec. 14 at 6.

Defendant responds that if Plaintiff claimed to be an owner of the Subject Property, she should have sought a certificate of discharge in her own name after the disputed funds were deposited with the IRS. Ct. Rec. 18 at 5. Defendant concludes that Plaintiff failed to exhaust administrative remedies under § 6325(b)(4) and bring a timely action under § 7426(a)(4) before this refund suit could be brought under § 1346(a)(1). To support its conclusion, Defendant's discussion includes cases addressing the interplay of §§ 6325(b)(4) and 7426(a)(4) and the holding of *United States v. Williams*, 514 U.S. 527, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995). [3] The Court agrees with Defendant that the case law does support Defendant's argument that a third-party must first exhaust the remedies provided by §§ 6325(b)(4) and 7426(a)(4) before bringing a refund suit under § 1346(a)(1). Plaintiff alleges, however, that she has exhausted her administrative remedies required under this statute. Plaintiff, in her Complaint and Amended Complaint, states that on or about July 15,

2005, a "Claim for Wrongfully Levied Property" was sent by certified mail to the defendant agency as required by 26 U.S.C. 7426(h)(2). See Amended Complaint, ¶ 3.16.

## ANALYSIS OF LAW

A revenue ruling, Rev. Rul. 2005-50, clarifies that, in light of amendments to §§ 6325 and 7426 of the Code made by the 'IRS Restructuring and Reform Act of 1998, a person not liable for the underlying tax may not file a refund action under the holding of *United States v. Williams*, 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995). See Rev. Rul. 2005-50, 2005-30 I.R.B. 124, 2005 WL 1710987 (IRS RRU).

In this case, Mr. Crytser, and not Plaintiff, was liable for the underlying taxes, which were assessed prior to the date Plaintiff's property ownership vested pursuant to the Prenuptial Agreement. Section 6321 provides that if any person liable to pay any tax neglects or refuses to pay after notice and demand for payment, the amount due shall be a lien in favor of the United States on all property and rights to property, whether real or personal, belonging to that person. Section 6322 provides that once the federal tax lien has arisen, it continues until the tax liability giving rise to the lien is paid or becomes unenforceable by reason of lapse of time. See I.R.C. § 6502 (collection after assessment). In order for the lien imposed by § 6321 to be valid against certain persons, notice must be filed by the Service in accordance with § 6323. This notice requirement is pertinent as to any "purchaser" under § 6323(a).

Section 6325(b) provides several procedures for

discharging property subject to a lien imposed by § 6321. Under § 6325(b)(2)(A), the IRS may issue a certificate of discharge pursuant to which the government is paid the value of its lien interest in the property to be discharged. Persons who request a certificate of discharge under section 6325(b)(2)(A) may not seek judicial review of the IRS's valuation determination through a refund action under 28 U.S.C. § 1346(a)(1). See *City of Richmond v. United States*, 348 F. Supp. 2d 807, 813-14 (E.D. Ky. 2004). See Rev. Rul. 2005-50, 2005-30 I.R.B. 124, 2005 WL 1710987 (IRS RRU).

A second discharge procedure is set forth in section 6325(b)(4), under which the owner of property subject to a federal tax lien (other than the person liable for the tax) has the right to obtain a discharge upon either depositing cash or furnishing a bond acceptable to the IRS in the amount the Service has determined to be the value of the lien interest of the United States. I.R.C. § 6325(b)(4)(A). The IRS must refund the amount deposited or release the bond, to the extent that it determines that the taxpayer's unsatisfied liability giving rise to the lien can be satisfied from a source other than property owned (or owned in part) by the third party, or to the extent that it determines that the value of the interest of the United States in the property is less than the IRS's prior determination of value. I.R.C. § 6325(b)(4)(B). Any amount not used to satisfy the liability shall be refunded to the owner of the property. I.R.C. § 6325(b)(4)(C). Id.

The owner of the property has 120 days after the date the certificate of discharge under section 6325(b) (4) is issued to file a substitution of value action in district

court challenging the IRS's determination of the value of the lien interest of the United States. I.R.C. § 7426(a)(4). If the owner of the property does not challenge the IRS's determination within the 120-day period, the IRS shall, within 60 days after the expiration of the 120-day period, apply the amount deposited or collected on the bond to the extent necessary to satisfy the liability secured by the lien. If the owner successfully challenges the IRS's determination of the value of the lien interest of the United States, the court shall enter judgment ordering a refund of the amount deposited or a release of the bond to the extent that the amount of the deposit or bond exceeds the value of the lien interest determined by the court. I.R.C. § 7426(b)(5).

Sections 6325(b)(4) and 7426(a)(4) were enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, in response to the inadequate remedy problem identified by the Supreme Court in *United States v. Williams*, 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995). See S. Rep. No. 105-174, at 54-55 (1998), reprinted in 1998-3 C.B. 537, 590-91. In *Williams*, the Court held that a third party who paid another person's tax liability under protest had standing to bring a refund action under 28 U.S.C. § 1346(a)(1). The Court noted that the third party "had no realistic alternative to payment of a tax she did not owe, and we do not believe that Congress intended to leave parties in respondent's position without a remedy." *Williams*, 514 U.S. at 529 (footnote omitted).

Sections 6325(b)(4) and 7426(a)(4) provide the remedy that was unavailable to the third party in *Williams*.

Section 7426(a)(4) specifically states that "[n]o other action may be brought by such person for such a determination." Additionally, section 7426(a)(4) imposes a strict 120-day time limit for filing a substitution of value action in district court challenging the IRS's determination of value. Permitting a third party to bring another action, such as a refund suit, would conflict with the 120-day limit Congress imposed on actions brought under section 7426(a)(4). Rev. Rul. 2005-50, 2005-30 I.R.B. 124, 2005 WL 1710987 (IRS RRU) (citing *City of Richmond*, 348 F. Supp. 2d at 813-14.)

The cause of action Congress provided in section 7426(a)(4) is limited to cases in which a third party has received a certificate of discharge from the IRS under section 6325(b)(4). *Wilson v. United States*, 2004 U.S. Dist. LEXIS 6474, 2004 WL 790220, at *2, 93 AFTR 2d 2004-1390 (E.D. Tenn. Feb. 24, 2004) ("On its face, 26 U.S.C. § 7426(a)(4) limits itself to permitting claims pursuant to 6325(b)(4)."). Courts lack subject matter jurisdiction over cases brought challenging the IRS's valuation determination if the certificate of discharge was sought under section 6325(b)(2), rather than section 6325(b)(4). See Rev. Rul. 2005-50, 2005-30 I.R.B. 124, 2005 WL 1710987 (IRS RRU) (citing *Wilson*, 2004 U.S. Dist. LEXIS 6474, 2004 WL 790220, at *2.)

In the present case, Plaintiff is a third party who did not seek a certificate of discharge in her own name or use the available remedies before bringing the present refund suit. Plaintiff's "Claim for Wrongfully Levied Property" sent to the Defendant on July 15, 2005 was not the proper procedure pursuant to § 6325. There is also no evidence Plaintiff deposited cash or furnished a

bond acceptable to the IRS pursuant to § 6325. Revenue Ruling 2005-50 supports the Defendant's argument that a third-party must first exhaust the remedies provided by §§ 6325(b)(4) and 7426(a)(4) before bringing a refund suit under § 1346(a)(1).

Although Plaintiff focuses on the date the Notice of Federal Lien was recorded with the county recorder's office, the validity and priority of the federal tax lien against Plaintiff's interest does not depend on such filing of the notice of the lien. Furthermore, Plaintiff cannot be considered a "purchaser" under § 6323(a) based on the Prenuptial Agreement as she did not pay "adequate and full consideration in money or money's worth" for her interest in the property, which vested on August 18, 2004.

Contrary to Plaintiff's argument, when the IRS made the assessment against Mr. Crytser on June 23, 2003, the tax lien attached to all of Mr. Crytser's property, including the subject real property. See Amended Complaint, Exh. C; 26 U.S.C. §§§ 6321, 6322, 6323. *See also United States v. McDermott*, 507 U.S. 447, 448, 113 S. Ct. 1526, 123 L. Ed. 2d 128 (1993); *TKB Int'l Inc. v. United States*, 995 F.2d 1460, 1463 (9th Cir.1993) (citation omitted); *Miller v. United States*, 763 F.Supp. 1534, 1539 n. 8 (N.D.Cal.1991) (Patel, J.) (noting that "[n]umerous cases stand directly for the proposition that a federal tax lien arises when the IRS makes an assessment coupled with a demand for payment. " (citations omitted)). Although the IRS did not record the tax lien until August 30, 2004, the lien was valid as against Mr. Crytser-the taxpayer-as of June 23, 2003. *TKB Int'l Inc.*, 995 F.2d at 1463 (noting that the IRS does not have to file notice of a federal tax lien in order

for the lien to be valid as against the taxpayer). However, as discussed more fully below, if the IRS does not record a notice of a federal tax lien, this may affect the priority of the tax lien vis-a-vis certain third party interests in the property. *Id.*

Under the first in time principle, the tax lien-which attached on June 23, 2003-had priority over any interest plaintiff may have had in the subject property as of August 18, 2004. *See McDermott*, 507 U.S. at 449. Consequently, the interest-if any-that plaintiff took in the property on the date of her marriage to Mr. Crytser was subject to the federal tax lien. However, it appears that at the time the Internal Revenue Service lien arose, the Plaintiff had no property interest to which it could attach.

Section 6323 of the IRC governs the priority of interest between a federal tax lien arising under § 6321 and certain third-party claims to the property to which the federal tax lien has attached. Section 6323(a) provides that "[t]he lien imposed by § 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection(f) has been filed by the Secretary." Because it is clear that plaintiff cannot qualify as a holder of a security interest, mechanic's lienor, or judgment lien creditor, the Court looks at whether Plaintiff might qualify as a purchaser under § 6323(a). If Plaintiff is found to be a purchaser, the tax lien may be displaced under certain circumstances. In addressing the question of whether Plaintiff qualifies as a "purchaser" under § 6323(a), "[f]ederal law alone is decisive." *Berg v. United States*, 121 F.3d 535, 537 (9th Cir.1997) (holding that a "good

faith purchaser" under state law is not necessarily a purchaser for "full and adequate consideration" under section 6323(a) of the IRC (*citing In re Walter*, 45 F.3d 1023, 1030 (6th Cir.1995)).

In the present action, Plaintiff fails to meet any of the definitions of purchaser under § 6323(a). For purposes of this section, a "purchaser" is defined as "a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice." Plaintiff is not such a purchaser. As such, Plaintiff's interest would not have priority over the tax lien. Once a federal tax lien is created, it "continues to attach to a taxpayer's property regardless of any subsequent transfer of the property." *United States v. Donahue Indus., Inc.*, 905 F.2d 1325, 1330 (9th Cir.1990).

In the letter dated October 26, 2004 to Plaintiff's husband Mr. Crytser, the IRS clearly states in its "Conditional Commitment to Discharge Certain Property From Federal Tax Lien" that upon receipt of a certified check, it would issue a certificate discharging the property against the taxpayer named in the letter, Scott W. Crytser. See Amended Complaint, Exh. G.

Based on the foregoing, the court finds that the tax lien attached to the Subject Property on June 23, 2003 when the IRS made an assessment against Mr. Crytser. Given that Plaintiff does not qualify as a "purchaser" under § 6323(a) of the IRC, the interest that she received in the subject property by virtue of the Prenuptial Agreement cannot trump the federal tax

lien, which was recorded on August 30, 2004. When Mr. Crytser conveyed an interest in the subject property to Plaintiff on August 18, 2004, she took the property subject to the tax lien. Accordingly, the court finds that as a matter of law, Plaintiff is not entitled to a refund of the sum Mr. Crytser deposited with the IRS on October 29, 2004 to discharge the federal tax lien.

## USA'S OBJECTIONS TO DECLARATIONS

Defendant moves to strike portions of the declarations of Plaintiff Nina Crytser and Declaration of Scott Crytser that are allegedly not relevant to determining whether jurisdiction exists for a wrongful levy action under 26 U.S.C. § 7426(a)(1). Specifically, Defendant seeks to strike the statements in the declarations about the purported intent of the parties in signing the Prenuptial Agreement.

Declarations and exhibits are relevant to the extent they have a tendency to make the existence of any material fact more or less probable. See Fed.R.Evid. 401. Further, the Court looks to the unambiguous language in the Prenuptial Agreement which cannot be modified by the subject declarations under *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222 (1990). The Court agrees that the disputed statements are not relevant as to the jurisdictional matters, however, the declarations will not be stricken.

## CONCLUSION

The federal tax lien arose pursuant to § 6321 of the Internal Revenue Code, 26 U.S.C. § 6321. *See In re Kimura*, 969 F.2d 806, 809 (9th Cir.1991) (finding that

when the IRS assesses civil penalties for taxes owed pursuant to section 6672 of the IRC, a federal tax lien attaches to the all of the taxpayer's property pursuant to § 6321 of the IRC). The parties do not genuinely dispute that Mr. Crytser, the taxpayer, held full legal and equitable title to the subject real property on June 23, 2003, the date of the assessment. Consequently, Mr. Crytser held a property interest to which the tax lien could properly attach. *Aquilino v. United States*, 363 U.S. 509, 512, 80 S. Ct. 1277, 4 L. Ed. 2d 1365, 1960-2 C.B. 477 (1960). Contrary to Plaintiff's argument, it is irrelevant that she had an interest that vested in August 2004. The tax lien attached when Mr. Crytser held full legal and equitable title to the subject property. In light of the foregoing, this Court concludes that Plaintiff failed to exhaust administrative remedies under § 6325(b)(4) and bring a timely action under § 7426(a)(4) before initiating this refund suit under § 1346(a)(1). The court therefore must dismiss Plaintiff's action for refund. Additionally, Plaintiff's wrongful levy claim must also be dismissed based on lack of subject matter jurisdiction. Accordingly,

**IT IS ORDERED**, that Defendant United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and For Failure to State a Claim for Which Relief Can Be Granted, Ct. Rec. 5, is **GRANTED.** The wrongful levy claim is dismissed for lack of subject matter jurisdiction. The refund action is dismissed under Rule 12(b)(6) for the foregoing reasons.

The District Court Executive is directed to file this Order; provide copies to plaintiffs and counsel of record; ENTER JUDGMENT CONSISTENT WITH THIS ORDER; and CLOSE FILE.

**DATED** this 2nd day of November, 2006.

***s/ Lonny R. Suko***

UNITED STATES DISTRICT JUDGE

Footnotes

[1]Ct. Rec. 14 at 2.

[2]The Court uses the term levy as defined in Black's Law Dictionary as: "To impose or assess (a fine or a tax) by legal authority." Black's Law Dictionary 927 (8th ed.2004)

[3]Congress enacted § 3106 of the Internal Revenue Service Restructuring & Reform Act of 1998 to address the problem that the Court faced in *Williams*. This amendment added subsection (b)(4) to 26 U.S.C. § 6325 and subsection (a)(4) to 26 U.S.C. § 7426. The new statutory scheme of 26 U.S.C. § 6325(b)(4) requires the IRS to issue a certificate of discharge as a matter of right to third parties under specified circumstances and 26 U.S.C. § 7426(a)(4) provides a judicial remedy. Pursuant to 26 U.S.C. § 6325(b)(4)(A), the third party has the right to obtain a certificate of discharge by applying to the Secretary of the Treasury for such a certificate and either depositing cash or furnishing a bond sufficient to protect the lien interest of the United States. The Secretary does not have the discretion to refuse to issue a certificate of discharge if this procedure is followed, thus curing the defect in this remedy discussed in *Williams*. See *City of Richmond, Ky. v. U.S.*, 348 F.Supp.2d 807, 812-13 (E.D.Ky. 2004).

11/3/2006
NO. CV-06-175-LRS
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON

NINA V. CRYTSER,
Plaintiff,

-vs-

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendant pursuant to the Order Granting United States' Motion to Dismiss (Ct. Rec. 19) filed on November 2, 2006.

JUL 18 2008

No. 07-35007

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NINA V CRYTSER, a married woman,
Plaintiff - Appellant,
v.
UNITED STATES OF AMERICA,
Defendant - Appellee.

ORDER

Before: BEA and M. SMITH, Circuit Judges, and HOOD, Senior District Judge.*

The panel has unanimously voted to deny the petition for rehearing. Judges Bea and M. Smith have voted to deny the petition for rehearing en banc. Judge Hood so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are denied.

Footnote

* The Honorable Joseph M. Hood, Senior U.S. District Judge for the Eastern District of Kentucky, sitting by designation.